



BellSouth Telecommunications, Inc.  
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Nashville, TN 37201-3300

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REC'D TN  
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EXECUTIVE SECRETARY

April 27, 2001

**VIA HAND DELIVERY**

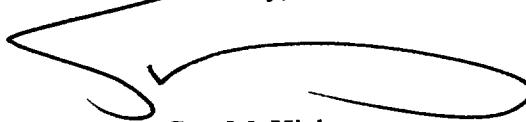
Mr. David Waddell, Executive Secretary  
Tennessee Regulatory Authority  
460 James Robertson Parkway  
Nashville, Tennessee 37245

Re: *Petition of ATM Discount Communications, Inc. for Arbitration with BellSouth  
Telecommunications, Inc.*  
Docket No. 01-00302

Dear Mr. Waddell:

Enclosed please find the original and thirteen copies of BellSouth's Motion to Dismiss and Answer in the above-referenced arbitration. Copies have been provided to counsel of record.

Sincerely,



Guy M. Hicks

GMH/jej

BEFORE THE TENNESSEE REGULATORY AUTHORITY  
Nashville, Tennessee

In Re: *Petition of ATM Discount Communications, Inc. for Arbitration with BellSouth Telecommunications, Inc.*

Docket No. 01-00302

**MOTION TO DISMISS AND ANSWER OF  
BELLSOUTH TELECOMMUNICATIONS, INC.**

Pursuant to 47 U.S.C. § 252(b)(3), BellSouth Telecommunications, Inc. ("BellSouth"), responds to the Petition for Arbitration filed by ATM Discount Communications, Inc. ("ATM Discount") and shows as follows:

**I. OVERVIEW**

Sections 251 and 252 of the Telecommunications Act of 1996 ("1996 Act") encourage negotiations between parties to reach local interconnection agreements. Section 251(c)(1) of the 1996 Act requires incumbent local exchange companies ("ILECs") to negotiate the particular terms and conditions of agreements to fulfill the duties described in Sections 251(b) and 251(c)(2-6).

Since passage of the 1996 Act on February 8, 1996, BellSouth has successfully conducted negotiations with a large number of competitive local exchange carriers ("CLECs") in Tennessee. To date, the Tennessee Regulatory Authority ("TRA") has approved numerous agreements between BellSouth and CLECs. The nature and extent of these agreements vary depending on the individual needs of the companies, but the conclusion is inescapable – BellSouth has a record of embracing competition and displaying willingness to compromise and interconnect on fair and reasonable terms.

As part of the negotiation process, the 1996 Act allows a party to petition a state commission for arbitration of unresolved issues.<sup>1</sup> The petition must identify the issues resulting from the negotiations that are resolved, as well as those that are unresolved.<sup>2</sup> The petitioning party must submit along with its petition "all relevant documentation concerning: (1) the unresolved issues; (2) the position of each of the parties with respect to those issues; and (3) any other issue discussed and resolved by the parties."<sup>3</sup> A non-petitioning party to a negotiation under this section may respond to the other party's petition and provide such additional information as it wishes within 25 days after the commission receives the petition.<sup>4</sup> The 1996 Act limits the commission's consideration of any petition (and any response thereto) to the unresolved issues set forth in the petition and in the response.<sup>5</sup>

In February 1998, BellSouth and Discount Communications, a sole proprietorship owned by Ed Hayes, entered into a Resale Agreement ("Agreement") that has since expired. In October 2000, BellSouth and ATM Discount, a corporation, began negotiating the Resale Agreement that is the subject of this proceeding. Although BellSouth and ATM Discount have negotiated in good faith, they have been unable to reach agreement on some issues. As a result, ATM Discount filed its Petition for Arbitration.

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<sup>1</sup> 47 U.S.C. § 252(b)(2).

<sup>2</sup> *See generally*, 47 U.S.C. §§ 252 (b)(2)(A) and 252 (b)(4).

<sup>3</sup> 47 U.S.C. § 252(b)(2).

<sup>4</sup> 47 U.S.C. § 252(b)(3).

<sup>5</sup> 47 U.S.C. § 252(b)(4).

Through the arbitration process, the state commission must resolve the unresolved issues ensuring that the requirements of Sections 251 and 252 of the 1996 Act are met. The obligations contained in those sections of the 1996 Act are the obligations that form the basis for negotiation, and if negotiations are unsuccessful, then form the basis for arbitration. Issues or topics not specifically related to these areas should be outside the scope of an arbitration proceeding. Once the commission has provided guidance on the unresolved issues, the parties must incorporate those resolutions into a final agreement to be submitted to the commission for approval.<sup>6</sup>

## **II. FIRST DEFENSE AND MOTION TO DISMISS**

As explained more fully below, ATM Discount has neither applied for nor been granted a certificate of convenience and necessity to provide telecommunications services in the State of Tennessee. Moreover, it is unlikely that ATM Discount could obtain such a certificate because recent proceedings before the United States Bankruptcy Court in Memphis reveal that it does not possess sufficient financial abilities to provide telecommunications services in the State of Tennessee. *See* T.C.A. §65-4-201(c)(2). The TRA, therefore, should dismiss the Petition because ATM Discount is not entitled to avail itself of the rights set forth in Section 252 of the Act, including the right to seek arbitration before the TRA.<sup>7</sup>

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<sup>6</sup> 47 U.S.C. § 252(a).

<sup>7</sup> BellSouth does not knowingly submit negotiated or arbitrated agreements to a State commission for approval if the other party to the agreement is not certificated. As explained below, for example, Discount Communications was a certificated sole proprietorship at the time BellSouth filed the resale agreement between Discount Communications and BellSouth with the Authority for approval. BellSouth, however, has a "duty to negotiate in good faith in accordance with Section 252 the particular terms and conditions of agreements to fulfill the duties described in [the relevant provisions of Section 251 of the 1996 Act]." 47 U.S.C. §251(c)(1). In light of this duty, BellSouth often negotiates with entities that are not yet certificated in a particular state. These entities, however, typically are in the process of seeking certification or intend to obtain such certification prior to filing a negotiated or arbitrated agreement with a particular State

**A. ATM Discount Communications Inc. has neither applied for nor been granted a certificate of convenience and necessity.**

On January 8, 1998, "Discount Communications" applied for a certificate to resell telecommunications services in Tennessee. *See* Exhibit "A" (copy of application). This application indicates that Discount Communications is an "individual." *See* Exhibit "A," Part II: Organizational Structure. A few weeks later, BellSouth entered into a resale agreement with Discount Communications, and Ed Hayes signed the resale agreement in his capacity as owner and sole proprietor of Discount Communications. Around August or September of 1998, Discount Communications moved its operations from the home of Ed Hayes to the offices of Air Time Management, Inc., a reseller of cellular phone services. (*See* Transcript of Section 341 Meeting, Testimony of Morris Harris, Sr., p. 7).<sup>8</sup> The two entities, while operating under the same roof, maintained distinct identities. (Section 341 Transcript at p. 7-8, 40).

On April 10, 2000, Discount Communications and Air Time Management, Inc. combined to form ATM Discount Communications, Inc. (Section 341 Transcript, p. 4). Neither Discount Communications, Air Time Management, Inc., nor ATM Discount Communications, Inc. informed BellSouth of this conversion from a sole proprietorship to a corporation, and BellSouth did not consent to the transfer of the resale agreement to the corporation. More importantly, ATM Discount Communications, Inc. never sought or obtained certification from the TRA to act as a reseller of telephone service.

Instead, in February 2000, Ed Hayes sent the TRA a letter which states, in full:

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commission.

<sup>8</sup> Relevant portions of Morris Harris, Sr.'s testimony at the Section 341 meeting are attached as Exhibit "B."

This letter is to serve as notice that Discount Communications has undergone a name change. The new name for Discount Communications is ATM/Discount Communications. The address for ATM/Discount Communications is 3798 Park Ave. Memphis, TN 38111. Please allow all previous and future records to reflect this change.

*See Exhibit "C"* (emphasis added). Pursuant to Rule 1220-4-8-.04(1)(c) and (e), this letter should have included, at a minimum, the name and addresses of ATM Discount's principal corporate officers, information about the structure of the business organization, a copy of ATM Discount's articles of incorporation or by-laws, and a copy of ATM Discount's license to do business in Tennessee. None of this information was included in this letter. In fact, nothing in this letter states or even suggests that "ATM/Discount Communications" is a corporate entity. Neither the word "corporation" nor any abbreviation suggesting a corporate entity (such as Inc. or Co.) appears anywhere in the letter, and the letterhead itself refers to Discount Communications, which is a sole proprietorship. Nothing in the letter, therefore, even hints at the fact that the sole proprietorship known as Discount Communications was doing anything other than simply changing its name.

Based on the information Mr. Hayes provided in his letter, the TRA issued an Order granting "ATM/Discount Communications" a certificate of public convenience and necessity to provide resold telecommunications in Tennessee "as specified in its application on file with the Authority." *See Exhibit "D."* Significantly, the application on file with the TRA continued to represent that the entity was a sole proprietorship and not a corporation. The Order also grants permission for the name change referenced in the letter. *See Id.* The TRA's Order, therefore, authorizes a sole proprietorship known as ATM/Discount Communications to provide resold telecommunications services in Tennessee. It does not authorize ATM Discount Communications, Inc. to provide any telecommunications services in Tennessee.

This is borne out by a recent ruling by the Bankruptcy Court in Memphis. On November 2, 2000, ATM Discount Communications Inc. filed a Chapter 11 Bankruptcy Petition. The Bankruptcy Court issued an order in those proceedings holding that ATM Discount Communications Inc. is not a party to the former resale agreement between Discount Communications and BellSouth. Specifically, the Court found that:

the Debtor, ATM Discount Communications, Inc., is not a party to the contract between Discount Communications, a sole proprietorship owned by Ed Hayes, and BellSouth. Accordingly, the court finds that no executory contract exists between the Debtor and BellSouth and accordingly, the Debtor's motion to assume the executory contract should be and is hereby denied.

*See Exhibit "E."* The U.S. Trustee subsequently filed a motion to dismiss the bankruptcy case, noting that: (1) ATM Discount "has not filed any monthly operating reports;" (2) ATM Discount "has not . . . filed a Disclosure Statement or Plan within the 100 day period contemplated by [law];" and (3) in light of the Court's ruling that no executory contract exists between BellSouth and ATM Discount, "it appears that [ATM Discount] has little chance of reorganizing." *See Exhibit "F."* ATM Discount did not oppose this motion, and the Court dismissed the bankruptcy proceedings. *See Exhibit "G."*

The distinction between Discount Communications and ATM Discount Communications, Inc. is so significant that it led to the outright dismissal of a bankruptcy proceeding. The distinction is at least as significant in the context of this proceeding. The TRA may grant a certificate of public convenience and necessity only "if, after examining the evidence presented, the Authority finds . . . the applicant possesses sufficient managerial, financial and technical abilities to provide the applied for services." *See* T.C.A. §65-4-201(c)(emphasis added). Unlike Discount Communications and ATM/Discount Communications, both of which are sole proprietorships managed and controlled by Ed Hayes, ATM Discount Communications, Inc. is a

corporation managed and controlled by officers and directors of the corporation in accordance with the corporation's articles of incorporation and by-laws. Moreover, by incorporating, ATM Discount Communications, Inc. has altered the financial liability of the principals who were originally responsible for the financial performance of Discount Communications or ATM Discount Communications. Ed Hayes' personal assets, for instance, are available to pay the debts of Discount Communications the sole proprietorship, but they are not necessarily available to pay the debts of ATM Discount Communications, Inc. the corporation. These substantial changes in the entity providing telecommunications services in Tennessee and in the assets available to pay that entity's debts cannot be reasonably construed as a mere name change. Rather, the new entity must seek its own certification based upon accurate information regarding structure of the organization and the assets that are available to pay the organization's debts.

It is doubtful, however, that ATM Discount Communications Inc. could obtain a certificate of convenience and necessity. That corporate entity recently filed for bankruptcy, and during those proceedings, the U.S. Trustee took the position that ATM Discount Communications, Inc. "has little chance of reorganizing." *See* Exhibit "F." ATM Discount Communications, Inc. implicitly admitted the accuracy of this position by not opposing the motion, which was ultimately granted by the Bankruptcy Court. That same corporate entity would be hard pressed to make the showing of financial ability that is necessary to obtain a certificate of convenience and necessity. *See* T.C.A. §65-4-201(c)(2).



**B. An entity that is not certificated is not entitled to seek arbitration under section 252 of the Act.**

Section 251(c)(2) of the 1996 Act requires an incumbent local exchange provider ("ILEC") "to provide, for the facilities and equipment of any requesting *telecommunications carrier*, interconnection with the local exchange carrier's network...." (emphasis added). Section 251(c)(3) provides that the ILEC must "provide, to any requesting *telecommunications carrier for the provision of a telecommunications service*, nondiscriminatory access to network elements on an unbundled basis...." Finally, Section 251(c)(1), which imposes the duty to negotiate in good faith, refers explicitly to "telecommunications carriers." Thus, the duties and obligations of Section 251 are owed by ILECs to "telecommunications carriers."

Section 3(a)(49) defines a "telecommunications carrier" as "any provider of telecommunications service...." "Telecommunications service" is defined in Section 3(a)(51) as "the offering of telecommunications for a fee directly to the public...." In order to be able to offer telecommunications for a fee directly to the public in the State of Tennessee, ATM Discount must be certificated by the TRA. *See*, T.C.A. §65-4-201. Without certification, ATM Discount cannot qualify as a "telecommunications carrier" to whom the duties of Section 251 are owed.

Under Section 252(b), the TRA's obligation to conduct compulsory arbitration is to enforce the duties imposed upon ILECs by Section 251(c). As set forth above, an ILEC's duties under Section 251 are owed only to telecommunications carriers, and because ATM Discount is not certificated, it is not a telecommunications carrier. Thus, BellSouth has no Section 251 duties with respect to ATM Discount, and ATM Discount is not entitled to utilize arbitration to enforce such non-existent obligations.

Other State commissions have recognized that an entity that is not certificated does not constitute a telecommunications carrier and thus is not entitled to arbitration under Section 252 of the Act. The Georgia Commission, for instance, held that "[t]he Commission's jurisdiction to conduct compulsory arbitration under Section 252(b) relates to enforcing the incumbent LEC's Section 251(c) duties and obligations, which again are owed to telecommunications carriers." (*Order Dismissing Arbitration*, Docket No. 7270-U, 5/19/97, at 4). The Commission recognized that if an uncertificated entity was permitted to arbitrate, "then the Commission could be forced to entertain compulsory arbitration cases litigated by companies *that may never obtain certificates to provide any telecommunications services in Georgia.*" (*Id.*) (Emphasis added.) The Commission concluded that "its jurisdiction to conduct a Section 252(b) arbitration does not extend to a petitioner that is not a telecommunications carrier." (*Id.* at 5.)<sup>9</sup>

The North Carolina Utilities Commission ("NCUC") also reached the same result when it dismissed an arbitration petition filed by Pilgrim Telephone, Inc. in North Carolina. After noting that Pilgrim was not certificated in North Carolina, the NCUC reasoned that

Section 252 of [1996 Act] appears essentially premised upon a telecommunications carrier seeking interconnection with an incumbent local exchange carrier. Section 3(a)(49) defines a "telecommunications carrier" as "any provider of telecommunications services...." Section 3(a)(51) in turn defines "telecommunications service" as "the offering of telecommunications for a fee directly to the public...."

(*Order*, Docket No. P-895, 9/22/99, at 2). According to the NCUC, "Since Pilgrim is not

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<sup>9</sup> Low Tech Designs, Inc., the CLEC in question, appealed the GPSC's decision to the FCC, arguing that the FCC should preempt the arbitration because the state commission "had failed to act." The FCC denied Low Tech's appeal, concluding that, in fact, the state commission had acted by dismissing the arbitration. (*See Petition for Commission Assumption of Jurisdiction of Low Tech Designs, Inc.'s Petition for Arbitration with BellSouth Before the Georgia Public Service Commission*, CC Docket No. 97-164, Order, 10/08/97, at ¶ 39.).

certificated and is presumably not offering telecommunications services to the public for a fee in North Carolina, it is questionable whether Pilgrim qualifies even to file a Petition for Arbitration in North Carolina since it is not under...[the] definition [of] a telecommunications carrier here." (*Id.*) In addition to statutory concerns, the NCUC also held that "there are compelling policy reasons not to process the arbitration petitions of uncertificated telecommunications companies such as Pilgrim." (*Id.*) According to the NCUC, "[s]uch arbitrations would waste both the Commission's and the parties' resources in what would amount to a sterile exercise since there would be no legitimate customers to be served." (*Id.*) The NCUC held that "the Commission will decline to entertain arbitration petitions under Section 252 wherein the Petitioner is not certificated to provide service in this State." (*Id.* at 3).<sup>10</sup>

ATM Discount is not certificated to provide telecommunications services in Tennessee and, as explained above, it is highly unlikely that it could make the requisite showing of financial ability in order to become certificated. As a result, ATM Discount is not a telecommunications carrier and is not entitled to utilize the 1996 Act's arbitration procedures. Moreover, no public interest is served by having the TRA expend time and resources arbitrating an agreement for a company that may never be able to obtain a certificate in this State. Instead, ATM Discount should be required to obtain a certificate before the TRA hears an arbitration. For these reasons, and consistent with prior commission rulings in Georgia, North Carolina, and South Carolina, the TRA should dismiss ATM Discount's Petition. In the event the TRA denies BellSouth's Motion to Dismiss, BellSouth responds to the specific allegations set forth in the Petition as follows:

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<sup>10</sup> The South Carolina Public Service Commission also dismissed Pilgrim's Petition on the grounds that Pilgrim is not certificated in South Carolina. The South Carolina Commission returned the petition without issuing a written order.

### **III. SECOND DEFENSE AND RESPONSE TO PETITION**

1. In response to Paragraph I of the Petition, BellSouth admits that ATM Discount and BellSouth began negotiating an agreement for resale of BellSouth's services in Tennessee on October 24, 2000 and that the Petition was timely filed.

2. In response to Paragraph II of the Petition, BellSouth admits that the document attached to ATM Discount's Petition is a copy of BellSouth's current, standard Resale Agreement. BellSouth also admits that with the exception of the matters described as Issue A and Issue B in ATM Discount's Petition and the matters described as Issue C and Issue D in this Response, BellSouth and ATM Discount have agreed to all terms of BellSouth's current, standard Resale Agreement.

3. In response to Paragraph III of the Petition, and as set forth more fully below, BellSouth admits that the following issues are the only issues ATM Discount has purported to submit to the TRA for arbitration. BellSouth also states that the TRA should disregard ATM Discount's statements purporting to present BellSouth's positions regarding the issues in dispute. BellSouth's positions on these issues are set forth below.

**ISSUE A: Should Section 8.2.2 of Attachment 1 to the Resale Agreement be amended by inserting the words "to customers who have not previously received service" after the words "additional applications for service?"**

**BellSouth's Position:** The TRA should not require the parties to modify or amend the language of Section 8.2.2 of Attachment 1 of the Resale Agreement.

ATM Discount has agreed to pay the bills it receives from BellSouth "by the next bill date (i.e., same date in the following month as the bill date) . . . ." *See* Resale

Agreement, Attachment 1, §7.6.<sup>11</sup> Thus, Section 8.2.2 comes into play only when ATM Discount has ordered and received services from BellSouth, resold those services to ATM Discount's end users,<sup>12</sup> and then failed to pay BellSouth for those services by the next bill date.

BellSouth should not be required to provide additional services to ATM Discount if ATM Discount has not paid for the services it is already receiving from BellSouth. Section 8.2.2 of Attachment 1, therefore, provides that when ATM Discount does not pay for services it has already received by the next bill date, BellSouth may notify ATM Discount "that additional applications for service will be refused and that any pending orders for service will not be completed if payment is not received by the fifteenth day following the date of the notice." This provision allows ATM Discount to continue providing services it already is providing its end users while it pays off its overdue balances. It also limits the amount by which these overdue balances can grow by requiring ATM Discount to pay for the services it already is providing to its end users before it orders even more services for which it cannot pay.

When ATM Discount "restores" service to a customer whose service has been suspended or interrupted, this obviously constitutes an additional service that

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<sup>11</sup> This provision is not in dispute in this proceeding.

<sup>12</sup> The Petition states that "Discount is a pre-pay telephone service," *see* Petition at 2, which suggests that Discount bills and collects rates from its customers prior to providing them service. As of last year, Discount's rates were \$22.95 per month for basic residential service and \$65 per month for basic business service. (*See* Tr. of Hearing in Docket No. 00-00230, Vol. II, pp. 300-03).

BellSouth was not already providing at the time ATM Discount failed to pay its bill. ATM Discount should pay for the services it is already providing before it receives such additional services from BellSouth. This is a fair and equitable result.

**ISSUE B: What are the rates, terms and conditions of service for ATM Discount's use of BellSouth's Operational Support Systems ("OSS") (i.e. LENS) to place orders?**

**BellSouth's Position:** ATM Discount's Petition presents two distinct issues under this heading. The first issue, B(1), is what rates should apply if ATM Discount is unable to place an order electronically because LENS is not working properly. BellSouth's position on Issue B(1) is that when problems with LENS prevent ATM Discount from placing electronic orders that BellSouth normally accepts, BellSouth will accept manual orders from ATM Discount, work those manual orders, and charge ATM Discount the lower rates applicable to electronic orders.

The second issue, B(2), is whether BellSouth's charges of \$3.50 for an electronic resale order and \$19.99 for a manual resale order are appropriate. BellSouth's position on Issue B(2) is that these charges are cost-based and nondiscriminatory as required by the Telecommunications Act of 1996. The TRA, therefore, should approve these charges and reject ATM Discount's suggestion that the TRA apply the "methodology and adjustments adopted by the Authority in Docket 97-01262" to these charges.

If the TRA decides to explore ATM Discount's suggestion, however, it should not do so in the context of this two-party arbitration. In Docket 97-01262, the TRA accepted BellSouth's cost study which demonstrated a cost of \$9.83 for

each electronic order.<sup>13</sup> In compliance with the TRA's directives, BellSouth converted this charge of \$9.83 per electronic order to an additive to the recurring rates for certain UNEs. Applying a similar methodology to resale orders would require BellSouth to convert the charge of \$9.83 per electronic order to an additive to the resale rate for each resold service. Such a conversion obviously would impact all resellers, and just as every CLEC ordering UNEs had the opportunity to comment on the methodology adopted in Docket 97-01262, every CLEC ordering resold services should have the opportunity to comment on any similar methodology the TRA may adopt in the resale context. If the TRA decides to explore ATM Discount's suggestion, therefore, it should do so in the context of a generic docket, and not in this two-party arbitration.

4. In response to Paragraph IV of the Petition, BellSouth admits that the parties have agreed that BellSouth will not flow the \$3.50 state Lifeline credit amount to ATM Discount under the agreement that is the subject of this proceeding unless the Lifeline portions of the TRA's Order in Docket No. 00-00230 are reversed by the Courts. BellSouth also admits that in the unlikely event of such reversal, BellSouth has agreed that it will apply the Courts' rulings retroactively to the effective date of the agreement that is the subject of this proceeding. BellSouth denies the remainder of the allegations set forth in Paragraph IV of the Petition.

5. BellSouth admits that the issues raised by ATM Discount regarding performance measures and penalties (such as ATM Discount's concerns over reliability of the LENS system and the on-time implementation of LSRs) should be addressed in Docket No. 01-00193.

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<sup>13</sup> This \$9.83 figure adopted in Docket No. 97-01262 represents the costs of the development, maintenance, and ongoing support of electronic interfaces distributed among all

BellSouth also admits that it has agreed that once a final Order entered in that docket becomes effective, the terms of that Order will apply to the agreement that is the subject of this proceeding from the effective date of the Order forward. BellSouth, however, denies that the terms of any such final order should apply to anything that occurs under the agreement that is the subject of this proceeding before the effective date of such a final order.

6. In response to Paragraph VI of the Petition, BellSouth denies that ATM Discount is entitled to any of the relief sought in the Petition.

### **NEW MATTER**

7. It is unclear whether the parties agree on how to address charges for directory assistance and operator services under the new resale agreement. Out of an abundance of caution, and pursuant to Sections 252(b)(3) and 252(b)(4)(A) of the Act, BellSouth submits the following issues to the TRA for arbitration:

**ISSUE C: Should ATM Discount be required to pay for directory assistance services it receives from BellSouth under the resale agreement?**

**BellSouth's Position:** ATM Discount should pay for directory assistance services it receives from BellSouth just like every other reseller and end user in the State of Tennessee pays for such directory assistance services. In Docket No. 99-00391, the TRA approved BellSouth's tariff implementing charges for directory assistance services, and ATM Discount was fully aware that this tariff was in effect on the date the parties began negotiating the new resale agreement. Although the TRA's Order approving that tariff is on appeal, every reseller and every end user in Tennessee is paying for BellSouth's directory assistance service

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electronic orders – including electronic orders for both UNEs and resold services.



during the pendency of that appeal, and ATM Discount has no right to be treated any differently. In the unlikely event that the Courts reverse the TRA's Order, ATM Discount should be treated in the same manner as other resellers and end users who have been paying for directory assistance during the pendency of the appeal.

The TRA's Order in Docket No. 00-00230 does nothing to change this result. That Order applies only to the former resale agreement between BellSouth and ATM Discount Communications (as opposed to ATM Discount Communications, Inc.), and it states that BellSouth "should provide ATM Discount Communications with directory assistance access and usage during the term of the parties' resale agreement at no additional charge." *See* September 28, 2000 Order in Docket No. 00-00230 at 14. That Order does not apply to the resale agreement that is the subject of this proceeding, and it does not allow ATM Discount to receive free directory assistance under the resale agreement that is the subject of this proceeding.

**ISSUE D: Should ATM Discount be required to pay for operator services it receives from BellSouth under the resale agreement?**

**BellSouth's Position:** If ATM Discount orders and receives operator services from BellSouth under the resale agreement that is the subject of this proceeding, it should pay BellSouth for those services.

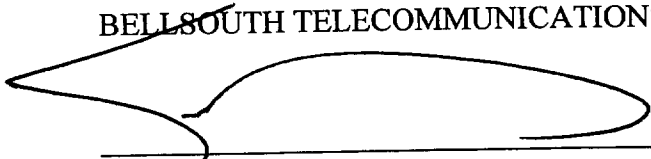
8. Any allegations not specifically admitted are hereby denied.
9. BellSouth requests that the TRA dismiss ATM Discount's Petition. In the alternative, BellSouth requests that the TRA arbitrate the issues set forth in ATM Discount's

Petition and in this Response and adopt BellSouth's position on each of these issues.

WHEREFORE, BellSouth respectfully requests that the TRA dismiss the Petition or, in the alternative, enter an order in favor of BellSouth on each of the issues set forth herein, and grant BellSouth such other relief as the TRA deems just and proper.

Respectfully submitted, this 27th day of April, 2001.

BELLSOUTH TELECOMMUNICATIONS, INC.

A large, stylized handwritten signature in black ink, appearing to read 'Guy M. Hicks', is written over a horizontal line.

Guy M. Hicks  
Joelle J. Phillips  
333 Commerce Street, Suite 2101  
Nashville, Tennessee 37201  
(615) 214-6301

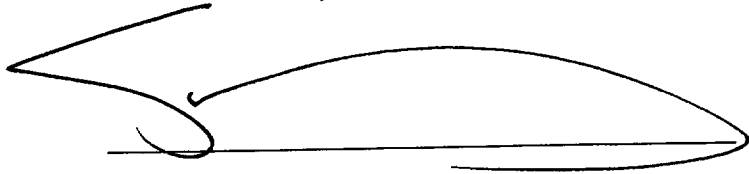
R. Douglas Lackey  
Patrick Turner  
675 West Peachtree Street, Suite 4300  
Atlanta, Georgia 30375

**CERTIFICATE OF SERVICE**

I hereby certify that on April 27, 2001, a copy of the foregoing document was served on the parties of record, via the method indicated:

- ☐ Hand
- ☒ Mail
- ☐ Facsimile
- ☐ Overnight

Henry Walker, Esquire  
Boult, Cummings, Conners & Berry  
414 Union Avenue, #1600  
Post Office Box 198062  
Nashville, Tennessee 37219-8062

A large, stylized handwritten signature in black ink, likely belonging to Henry Walker, is written over a horizontal line.

**EXHIBIT "A"**

# TENNESSEE REGULATORY AUTHORITY

Lynn Greer, Chairman  
Sara Kyle, Director  
Melvin Malone, Director



460 James Robertson Parkway  
Nashville, Tennessee 37243-0505  
**RECEIVED**  
TELECOMMUNICATIONS DIVISION  
TENNESSEE REGULATORY AUTHORITY

## APPLICATION FOR CERTIFICATE TO PROVIDE OPERATOR SERVICES AND/OR RESELL TELECOMMUNICATION SERVICES IN TENNESSEE [RULE 1220-4-2-.57]

JAN 09 1997

### SECTION A

#### Part 1: General Information

A. Name of Applicant Discount Communications  
Address 6647 Steeplechase Cir City Memphis  
State TN Zip Code 38141 Phone No. (901) 368-9955

B. Owner, Partners, or Corporate Officer

NAME	ADDRESS	CITY	STATE	ZIP CODE
<u>Ed Hayes</u>	<u>6647 Steeplechase</u>	<u>Memphis</u>	<u>TN</u>	<u>38141</u>

C. Name and telephone number of contact person authorized to respond to Authority inquiries Monday through Friday.  
Ed Hayes (901) 368-9955 (901) 368-7037  
Name Phone No. Fax No.

D. List a toll-free telephone number that consumers can call to report service problems and/or request refunds or adjustments. 0-901-368-9955

E. Check the type of telecommunication services you plan to provide in Tennessee.  
☐ Resell Interexchange long distance services  
☒ Resell Local Exchange services  
☐ Operator Services  
☐ Other (describe below) \_\_\_\_\_

F. If providing operator services, list company name, address and contact person for all reseller carriers you serve in Tennessee. Provide the above information on Appendix I.

G. List the state(s) you are authorized to operate in at this time. None

(To be filled out by TRA)  
Company ID Number 128102  
Date Approved \_\_\_\_\_  
Evaluator \_\_\_\_\_

H. List any states that you have been denied authority to provide service.

None

I. Areas in Tennessee to be served.

Memphis, Jackson, Nashville

J. What type of customers will the company serve?

a. Business \_\_\_\_\_

b. Residential X

c. Aggregators \_\_\_\_\_  
(e.g. Hotels, Payphones)

d. Other (specify) \_\_\_\_\_

K. Do you allow a property imposed fee (PIF) to be added to the price of intrastate telephone calls over your network? If yes, specify amount. no

L. Are your prices for intrastate services plus any PIF equal to or less than the dominant carriers price for similar services? Yes \_\_\_\_\_ No y

M. Describe the type of services and price that the applicant will be offering in Tennessee on the Informational Tariff Form found in Appendix II. Local phone services to customers who have had service with BellSouth or other phone companies from 39.95 a month

N. What is the applicant's 10XXX or 800 access code? 0-901-368-9955

O. Does the applicant now have or plan to have any telecommunication's facilities (e.g. switches, fiber lines) in Tennessee? no

P. What facility-based network will the applicant be reselling? \_\_\_\_\_

Q. Will the applicant be utilizing the local telephone company's billing system or billing customers direct? Direct billing

R. Describe briefly how the applicant plans to market their services in Tennessee? If an independent telemarketer is going to be used, state company name and address.

Direct marketing (in print and media such as newspaper and TV commercials)

S. Describe the procedures the applicant will use to switch a consumer's preferred interexchange service. Customer will fill out service application and pay for services in advance

T. Applicant has the ability and agrees to honor the form of call blocking that the consumer has subscribed to with their local telephone company. Yes \_\_\_\_\_ No \_\_\_\_\_

<sup>1</sup>Applicant is required to fill out an Informational Tariff form. Failure to fill out this form will cause the applicant's request to be rejected.

<sup>2</sup>A copy of a bill is required if the applicant is going to bill the customer direct.

T. Applicant has the ability and agrees to honor the form of call blocking that the consumer has subscribed to with their local telephone company. Yes ☒ No ☐

U. Applicant gives permission to the local telephone company to provide the Authority a periodic sample of the reseller's intrastate toll calls. The purpose of this analysis is to audit the reseller's rates to assure they are at or below the dominant carrier's tariffed rates. Yes ☒ No ☐

## Part II: Organization Structure

### A. Type of Organization

☒ Individual ☐ Corporation

☐ Partnership ☐ Other (Explain on separate sheet)

### B. If partnership and/or Non-resident

(1) Attach a copy of Articles of Incorporation and current by-laws.

(2) Attach a copy of Certification of Authority issued by Tennessee Secretary of State showing corporation's authority to engage in business in Tennessee.

## Part III: Financial Information

A. Attach a current financial statement showing in detail the applicant's financial condition, including balance sheet and income statement, or a copy of IRS form 1120 or 1065 filed by your business for the previous year. Attach, if available, a copy of your company's 10K and/or stockholder reports.

## Part IV: Display Card

Attach a copy of the display card to be placed on the aggregators telephone which shows what operator services are to be provided. The card must contain all required information listed in the attached Rule (1220-4-2-.57, B)<sup>3</sup>, which includes a toll-free number consumers can call for service problems and refunds.

---

<sup>3</sup>It is the responsibility of the reseller or operator service provider to assure that the appropriate display card is affixed to the aggregates telephones.

Appendix I

<u>Reseller Name</u>	<u>Address</u>	<u>Contact Person</u>
Discount Communications	6647 Steeplechase Memphis TN 38141	901-368-9955 Ed Hayes



Appendix II  
Informational Tariff Sheet

Description of Service	Applicant proposed Price change to consumer	Dominant Carriers <sup>4</sup> Price for similar service
1. Local Phone Service	39.95	39.95
2.		
3.		

<sup>4</sup>Dominant Carrier (South Central Bell or AT&T, whichever is appropriate). A copy of these companies' rates are found on Appendix V.

**EXHIBIT "B"**

1 IN THE UNITED STATES BANKRUPTCY COURT  
2 WESTERN DISTRICT OF TENNESSEE  
MEMPHIS DIVISION

3 IN RE:

4  
5 ATM DISCOUNT COMMUNICATIONS,  
INC.,  
6 Debtor.

\*  
\*  
\*  
\*  
\*  
\*

Case No. 00-33928-B  
Chapter 11

7  
8 FIRST MEETING OF CREDITORS  
9

10  
11  
12 The First Meeting of Creditors was held on  
13 December 6, 2000, beginning at approximately 1:30 p.m.,  
14 in the Office of the U. S. Trustee, Suite 400, 200  
15 Jefferson Avenue, Memphis, Tennessee.  
16  
17  
18  
19  
20  
21  
22

23  
24 CHERI F. SULLIVAN, CSR, RPR  
Suite 303, 22 North Second Street  
Memphis, Tennessee 38103  
(901) 527-1100

ORIGINAL

1 telecommunications services. We provide services  
2 through reselling to end users, which is the normal  
3 customers, and also to small businesses. We also  
4 provide paging services and cellular services, resell  
5 cellular services.

6 Q. Do any of those related businesses go under  
7 a different name, like ATM Discount Cellular or ATM  
8 Discount Paging?

9 A. No.

10 Q. All ATM Discount Communications?

11 A. Yes.

12 Q. Now, besides this basically reselling phone  
13 time, does ATM Discount Communications, Inc. do anything  
14 else? Does it have any other type of business or source  
15 of income?

16 A. No.

17 Q. Now, my understanding is that ATM Discount  
18 Communications, Inc. was formed in April of 2000; is  
19 that right?

20 A. Yes.

21 Q. Can you tell me about any businesses that  
22 preceded ATM Discount Communications, Inc.?

23 A. All right. ATM is an abbreviation, really  
24 abbreviation for Air Time Management. Air Time

1 corporation.

2 Q. And where was Discount operating out of  
3 when it was first formed?

4 A. It was out of the owner's home, and I  
5 cannot give you an address. I don't have it right on my  
6 tongue. It was out of his home.

7 Q. Did Discount at some point then move to the  
8 offices of ATM?

9 A. Yes.

10 Q. And where were those offices?

11 A. At that time of the move the offices was at  
12 3798 Park Avenue.

13 Q. All right. And when did that move occur?  
14 When did that consolidation occur or that move occur?

15 A. The move started in, I believe, August of  
16 1998. In fact, we had been in the building for about  
17 one month, so I believe it was August or September of  
18 1998, one of those dates, one of those months there.

19 Q. And essentially the two companies have  
20 been, from that time, operating more or less under one  
21 roof?

22 A. Well, operating under one roof, although it  
23 was still kind of --

24 Q. Distinction was maintained?

1 A. Yes. Yes.

2 Q. Maybe a customer could walk in the door and  
3 on one side they could see Discount Communications?

4 A. No, it was not that --

5 Q. Not that distinct?

6 A. No.

7 Q. What was distinct about it?

8 A. It was distinct because we had not engaged  
9 -- when I say engaged, we was doing everything. In  
10 fact, to go back, we actually started as a reseller for  
11 him. We were getting business through him and using him  
12 to deal with the business. We were reselling for him,  
13 and we was doing it on a commission type basis.

14 Q. Let me ask you this. Until the corporate  
15 change and consolidation formally occurred, in April of  
16 2000, prior to that were the books and records of ATM  
17 and Discount kept separately?

18 A. Yes.

19 Q. Who did the bookkeeping for ATM?

20 A. At that time -- I'm trying to think. I'm  
21 trying to think when Mr. Wright came on with us. I know  
22 ATM filed -- Air Time Management filed income taxes in  
23 1999, the first of 1999. I would say Mr. Wright -- I'm  
24 trying to think. It came from us keeping books, and

1 give any indepth. Our plan is to pay everybody that we  
2 owe what we owe them, and one of the reasons I'm saying  
3 this is that litigation to us is an extreme indication  
4 on how much we really owe Bell South.

5 Q. Maybe if I could summarize what I  
6 understand, that straightening out the monies owed to  
7 and from Bell South is at the core of the plan of  
8 reorganization?

9 A. Right, at the core, and we do plan -- we do  
10 plan to pay them every cent we owe them, but in the same  
11 instance we plan to get credit for every cent they owe  
12 us.

13 Q. Mr. Wright, I gather, will be the one  
14 filing the monthly operating reports?

15 A. Yes.

16 Q. And you all are aware of the obligation to  
17 pay the quarterly fees?

18 A. Right.

19 Q. To the U. S. Trustee program?

20 A. Right. In fact, I may add Mr. Wright will  
21 have complete access to our -- in fact, we have put him  
22 on-line so he can monitor our accounts at any time, he  
23 can look right into them.

24 Q. Just a few more questions. How did it come

1 business that used to belong to Air Time Management,  
2 Inc., correct?

3 A. Right.

4 Q. And then the paging business, was that also  
5 part of Air Time's business before the merger?

6 A. No, that was a new entity that we put  
7 together after we merged.

8 Q. Okay. So that's been since April of 2000,  
9 you started the paging business?

10 A. No, not April of 2000. We started the  
11 paging business January of 2000.

12 Q. But I understood from Mr. Haynes' questions  
13 that this started out as two separate businesses?

14 A. Yes.

15 Q. Air Time, which was a corporation?

16 A. Right.

17 Q. And Discount Communications, which was a  
18 sole proprietorship. There came a time that you  
19 operated under one roof, but it was two separate  
20 businesses?

21 A. Right. I may add that when you said  
22 component, in the business that we're in a pager is just  
23 another item. It's just like adding another item to  
24 your inventory or what you sell.



**EXHIBIT "C"**

**EXHIBIT "D"**

Company ID: 128121  
ATM Discount Communications  
3798 Park Ave.  
Memphis, TN 3811101

BEFORE THE TENNESSEE REGULATORY AUTHORITY  
Nashville, TN February 29, 2000




IN RE: CASE NUMBER: 00-00110  
Discount Communications to change its name to ATM/Discount Communications  
—ORDER—

This matter is before the Tennessee Regulatory Authority upon the petition of Network Telephone, Inc. to change its company name. The TRA considered this request at their regularly scheduled Conference held on February 29, 2000 and concluded that the applicant has met all the TRA requirements for changing its name.

Pursuant to § T.C.A. 65-4-113,

IT IS THEREFORE ORDERED:

1. That the petition of Discount Communications to change its name to ATM/Discount Communications is approved.
2. That ATM/Discount Communications holds a Certificate of Public Convenience and Necessity to provide resold telecommunications services in Tennessee as specified in its application on file with the Authority.
3. That said company shall comply with all applicable TRA rules and regulations.
4. That this order shall be retained as proof of certification with this Authority, and may be used to obtain appropriately tariffed service and billing arrangements from Authority authorized telecommunications service providers.

  
Chairman  
  
Director  
  
Director

ATTEST:   
Executive Secretary

**EXHIBIT "E"**

UNITED STATES BANKRUPTCY COURT

FILED

JAN 22 2001

UNITED STATES BANKRUPTCY COURT  
WESTERN DISTRICT OF TENNESSEE  
WESTERN DIVISION

CLERK OF COURT

~~WESTERN DISTRICT OF TENN.~~

In re:

ATM DISCOUNT COMMUNICATIONS, INC.

Case No. 00-33928-B

Debtor.

Chapter 11

---

**ORDER DENYING DEBTOR'S MOTION TO  
ASSUME OR REJECT EXECUTORY CONTRACT AND  
GRANTING MOTION TO LIFT AUTOMATIC STAY**

---

This matter came to be heard on January 4, 2001, upon the motion of the Debtor ATM Discount Communications, Inc. to assume an executory contract dated March 13, 1998, by and between Discount Communications and BellSouth Telecommunications, Inc. ("BellSouth"), and the objection of BellSouth thereto, and upon BellSouth's motion to lift automatic stay. Upon statement of counsel for the parties, and upon the entire record in this cause, the court made oral findings of fact and conclusions of law pursuant to Bankruptcy Rule 7052 which are incorporated herein by reference. Based on the record before the court, the court finds that the Debtor, ATM Discount Communications, Inc., is not a party to the contract between Discount Communications, a sole proprietorship owned by Ed Hayes, and BellSouth. Accordingly, the court finds that no executory contract exists between the Debtor and BellSouth and accordingly, the Debtor's motion to assume the executory contract should be and is hereby denied. In light of the court's finding, the court further finds that cause exists to completely lift the automatic stay pursuant to 11 U.S.C. § 362 with respect to BellSouth and to restore BellSouth to all of its pre-petition rights and the stay is hereby lifted. BellSouth and the Debtor are free to exercise whatever rights they deem appropriate before the Tennessee Regulatory Authority.

ATM DISCOUNT COMMUNICATIONS INC. > Case No. 00-33928-B  
ORDER DENYING DEBTOR'S MOTION TO  
ASSUME OR REJECT EXECUTORY CONTRACT AND  
GRANTING MOTION TO LIFT AUTOMATIC STAY.

The court further finds that the lifting of the automatic stay pursuant to this order will not be effective until ten (10) days after entry of this order. Pending any appeal of this order, the Debtor may continue escrowing payments of \$2500 per day in accordance with this court's order of November 30, 2000 provided further that nothing in this order shall be deemed to require BellSouth to accept future payments from this Debtor or shall be deemed a waiver of BellSouth's rights in the event such payments are accepted. Pending further order of the court, the \$50,000 security deposit paid to BellSouth pursuant to this court's order of November 30, 2000 shall be retained by BellSouth.

IT IS SO ORDERED.

  
WILLIAM HOUSTON BROWN  
UNITED STATES BANKRUPTCY JUDGE

DATED: 1/22/01

APPROVED:

WARING COX PLC.

By: 

Michael P. Coury #7002  
Kimberly E. Sands #20274

50 N. Front Street, Suite 1300  
Memphis, Tennessee 38103  
901-543-8000  
Attorneys for BellSouth Telecommunications, Inc.

ATM DISCOUNT COMMUNICATIONS INC. > Case No. 00-33928-B  
ORDER DENYING DEBTOR'S MOTION TO  
ASSUME OR REJECT EXECUTORY CONTRACT AND  
GRANTING MOTION TO LIFT AUTOMATIC STAY

LAW OFFICE OF NEAL LABOVITZ

By: 

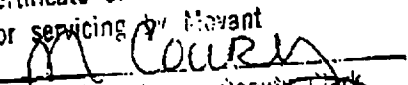
Neal Labovitz  
916 Fern Cliff Cove, Suite 1B  
Southaven, MS 38671

LAW OFFICE OF LARRY DIAMOND

By: \_\_\_\_\_

Larry Diamond  
236 Adams Ave.  
Memphis, TN 38103

cc: Sean Haynes

☐ Motion ☒ Order ☐ Other  
☒ Entered on the Court docket on  
1-22-01 and mailed to  
☐ Debtor(s) Attorney, Trustee  
☐ Servicing by Court  
☐ Certificate of Mailing to Matrix  
☒ For servicing by Movant  
  
By: R. Stanberry, Deputy Clerk

**EXHIBIT "F"**



UNITED STATES BANKRUPTCY COURT  
WESTERN DISTRICT OF TENNESSEE  
WESTERN DIVISION

UNITED STATES BANKRUPTCY COURT  
WESTERN DISTRICT OF TENNESSEE  
FILED  
JAN 13 2001  
JED G. WEINTRAUB  
CLERK OF COURT  
WESTERN DISTRICT OF TENN. JIB

IN RE: ATM/DISCOUNT COMMUNICATIONS, INC.,  
DEBTOR.

CASE NO. 00-33928-WHB  
CHAPTER 11

UNITED STATES TRUSTEE'S MOTION TO DISMISS OR,  
IN THE ALTERNATIVE, COVERT CHAPTER 11 CASE TO  
CASE UNDER CHAPTER 7

The United States Trustee for Region 8 ("UST") moves to dismiss this Chapter 11 case or, in the alternative, convert this Chapter 11 case to a case under Chapter 7.

In support of this Motion, UST states:

1. ATM/Discount Communications, Inc. ("Debtor") filed a voluntary petition under Chapter 11 on November 2, 2000.
2. Since that time, Debtor has not filed any monthly operating reports (the docket reflects that Debtor file a "compilation" of its financial condition for a pre-petition time-frame). As of the date of the filing of this Motion, Debtor is past-due for filing reports for the months-ended November and December 2000, and January 2001.
3. Debtor elected to be treated as a small business under 11 U.S.C. § 1121(e). Debtor has not, however, filed a Disclosure Statement or Plan within the 100 day period contemplated by that Section.
4. In its January 22, 2001 Order Denying Debtor's Motion to Assume or Reject, the Court found that "no executory contract exists between Debtor and BellSouth." In light of that ruling, it appears that Debtor has little chance of

38

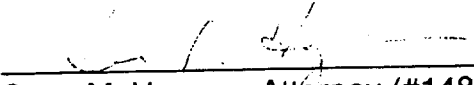
reorganizing.

WHEREFORE, THE ABOVE-PREMISES CONSIDERED, UST prays that:

1. This case be dismissed.
2. This Chapter 11 case be converted to a case under Chapter 7.
3. UST be granted such additional relief to which UST may be entitled.

Respectfully submitted,

ELLEN B. VERGOS  
UNITED STATES TRUSTEE, REGION 8

  
\_\_\_\_\_  
Sean M. Haynes, Attorney (#14881)  
Office of the U. S. Trustee  
200 Jefferson Avenue, Suite 400  
Memphis, Tennessee 38103  
(901) 544-3251

### CERTIFICATE OF SERVICE

I certify that a true and exact copy of the foregoing was mailed, first class postage prepaid, via United States Postal Service by on this 15 day of February 2001 to Neal H. Labovitz, Esquire, 1633 Stateline Road W., Southaven, MS 38671; Michael P. Coury, Esquire, 50 N. Front Street, Ste 1300, Memphis, TN 38103-1190 and Office of the Attorney General, 425 5<sup>th</sup> Ave. S., Cordell Hull Bldg., 2<sup>nd</sup> Floor, Nashville, Tennessee 37243.

  
\_\_\_\_\_  
Sean M. Haynes, Attorney (#14881)

**EXHIBIT "G"**

FILED  
APR 26 2001

NR

UNITED STATES BANKRUPTCY COURT  
WESTERN DISTRICT OF TENNESSEE  
WESTERN DIVISION

JED G. WEINTRAUB  
CLERK OF COURT

IN RE: ATM/DISCOUNT COMMUNICATIONS,  
DEBTOR.

CASE NO. 00-33928-B  
CHAPTER 11

ORDER RESOLVING MOTION TO DISMISS OR, IN THE ALTERNATIVE,  
CONVERT CHAPTER 11 CASE TO CASE UNDER CHAPTER 7

This matter came before the Court on April 5, 2001 upon the Motion to Dismiss or, in the Alternative, Convert Chapter 11 Case to Case Under Chapter 7 ("Motion") filed by the United States Trustee for Region 8 ("UST"); upon the stipulations of counsel for UST, ATM/Discount Communications, Inc. ("Debtor"), and counsel for BellSouth Telecommunications, Inc.; and upon the entire record herein.

It appears to the Court that Debtor does not oppose the Motion; and that, therefore, the case should be dismissed.

IT IS, THEREFORE, SO ORDERED that:

1. UST's Motion shall be and is hereby granted by consent; however, the effective date of dismissal shall be April 19, 2001.

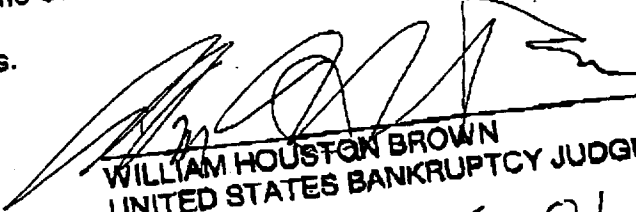
2. Because it is anticipated that one or more orders may be filed prior to the effective date of dismissal, the Clerk is directed to accept for filing any orders submitted prior to the effective date of dismissal (including any order resolving liabilities between the Debtor and the State of Tennessee).

ORDER ENTERED  
IN OPEN COURT

49

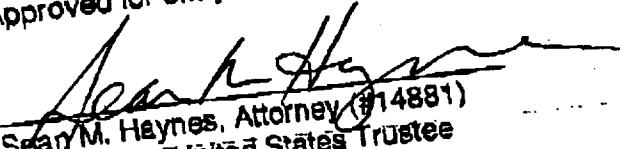
AGREED ORDER RESOLVING UNITED STATES TRUSTEE'S  
COMPLAINT TO REVOKE DISCHARGE PURSUANT  
TO 11 U.S.C. § 727(e)(2)


3. The Clerk of the Court is directed to serve a copy of this order on all  
creditors interested parties.

  
WILLIAM HOUSTON BROWN  
UNITED STATES BANKRUPTCY JUDGE

Dated: 4-26-01

Approved for entry:

  
Sean M. Haynes, Attorney (#14881)  
Office of the United States Trustee  
200 Jefferson Avenue, Suite 400  
Memphis, Tennessee 38103  
(901) 544-3251

  
Neal Labovitz, Attorney (#17381393)  
915 Ferndiff Cove, Suite 1B  
Southaven, MS 38671  
(662) 342-7957

☐ Motion ☒ Order ☐ Other  
☒ Entered on the Court docket on  
4-26-01 and mailed to:  
☐ Debtor(s), Debtor(s) Attorney, Trustee  
☒ Servicing by Court  
☒ Certificate of Mailing to Matrix  
☐ For servicing by Movant  
By: M. Riley, Deputy Clerk